

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

76-7457

IN THE
United States Court of Appeals
For the Second Circuit

CARL E. PERSON,

against

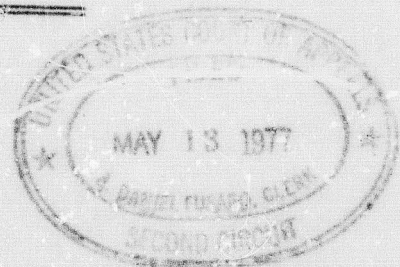
Plaintiff-Appellee,

THE ASSOCIATION OF THE BAR OF THE CITY OF
NEW YORK, SUPREME COURT, APPELLATE DIVISION,
FIRST DEPARTMENT, SUPREME COURT, APPELLATE
DIVISION, SECOND DEPARTMENT, and ATTORNEY
GENERAL OF NEW YORK STATE,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of New York

PETITION FOR REHEARING IN BANC



CARL E. PERSON, *Plaintiff-Appellee, pro se*
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New York, New York 10038
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CITATIONS

Page(s)

Cases:

National Auto Brokers Corp. v. General
Motors Corporation, CCH Trade Reg. Rep. ¶
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Statutes and Rules:

28 U.S.C. § 46(c)	1
Rule 35(a), F.R.App.P.	1
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Rule 23, F.R.Civ.P.	1
Code of Professional Responsibility, DR 2-106(B) (8) .	1
Code of Professional Responsibility, DR 7-109C . . .	1, et seq.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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CARL E. PERSON,	:	76-7457
	:	
Plaintiff-Appellee,	:	
	:	
-against-	:	
	:	
THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,	:	
SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,	:	
SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT,	:	
and ATTORNEY GENERAL OF NEW YORK STATE,	:	
	:	
Defendants-Appellees,	:	
	:	
-----x	:	

PETITION FOR REHEARING IN BANC

This is a petition for rehearing in banc, pursuant to Rules 40(a) and 35(a), F.R.App.P and 28 U.S.C. § 46(c). This Court, by a panel consisting of Chief Judge Kaufman and Circuit Judges Smith and Mulligan, reversed a summary declaratory judgment rendered in the Eastern District of New York declaring unconstitutional Disciplinary Rule 7-109C of the lawyer's Code of Professional Responsibility. Such rule prohibits the payment of contingent fees, however, reasonable, to expert witnesses.

In the opinion written by Judge Smith, it appears that the Court mistakenly believed that petitioner's clients in the Naboor Action were class representatives under Rule 23, F.R.Civ.P., with little at stake in the Naboor Action. This is suggested by the following language in the Court's slip opinion:

"It may be conceded that litigation of difficult and complex matters by persons with small individual stakes in the outcome may be aided and encouraged by elimination of the prohibition against the hiring of experts whose fees may be contingent upon the results." p. 3268

and

"We think that the interest in treble damage antitrust claims of persons with little at stake individually is more closely akin to the legislatively created interest in the shedding of debt obligations through bankruptcy of Kras than to the fundamental interest of an individual in the marriage relationship which was before the Court in Roddie," p. 3268

Actually, petitioner's 10 plaintiffs in the Nabcor Action are seeking \$100,000,000 in damages, before trebling, for themselves, and not for members of any class (JA-6). (Their request for class-action status to represent the 240 other Nabcor brokers was denied in the District Court.) Petitioner's ten clients have been forced out of their respective automobile brokerage businesses because of the alleged Sherman Act violations (JA-6); and most of them are insolvent or bankrupt (JA-10-11; JA-12).

Also, this Court may have failed to take into account the fact that a plaintiff unrepresented by an attorney is not prohibited from using an expert witness on a contingent-fee basis. This seems to be irrational state regulation. The Court's opinion did not refer to this irrationality. The prohibition in the Code of Professional Responsibility is irrational because the Code permits attorneys to accept a contingent fee. DR 2-106(B)(8). Any valid

state rule to prohibit payment of expert witnesses on a contingent-fee basis should have been by statute or court rule applicable to parties to lawsuits, not their attorneys, if any. The rule applied to attorneys alone is irrational. The Court seemed to have overlooked this point.

Also, DR 7-109C is irrational because it prohibits contingent fees of as little as one cent, or even reimbursement of the expert witnesses' out-of-pocket expenses (amounts or types of expense which clearly could be no inducement for the witness to commit perjury), but the rule does not prohibit million dollar on-going business relationships between the expert witness and the party or the party's attorney. This irrationality seems defenseless. The Court's opinion apparently did not agree.

Also, not having expert witnesses in antitrust cases does not merely make a plaintiff "less effective (slip opinion at p. 3264). The absence of expert testimony can be determinative of the black or white issue of liability, thereby resulting in a denial of genuine access to the court. Part A of the Naboor Action (against the General Motors defendants) was dismissed, during trial, at the end of the plaintiffs' case, for alleged lack of sufficient evidence on the issue of liability (among other alleged reasons). This result can hardly be called "less effective". See National Auto Brokers Corp. v. General Motors Corp., OCH Trade Reg. Rep. ¶ _____ (S.D.N.Y., Judge Griesa, decided December 6, 1976).

The issue of access to the courts is a fundamental issue, and the constitutionality of the professional rule which blocks access to the courts is a matter of exceptional importance, warranting rehearing by the panel and by the Court in banc. The issue is of national concern, in every federal and state court of original jurisdiction. The case is one of first impression and it probably will have a substantial effect on all court "access" problems, cases and state regulation in the next few years.

CONCLUSION

Petitioner respectfully requests that the appeal be reheard, and that the rehearing take place before this Court in banc.

Dated: New York, New York
May 13, 1977

Respectfully submitted,

Carl E. Pearson, Esq.
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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CARL E. PERSON,

Plaintiff-Appellee,

-against-

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,
SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,
SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT,
and ATTORNEY GENERAL OF NEW YORK STATE,

Defendants-Appellants.
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STATE OF NEWS


STATE OF NEW YORK)

:: SS.:

COUNTY OF NEW YORK)

JOHN G. O'KEEFFE, being duly sworn, does depose and says:

That on the 13th day of May, 1977, affiant served the annexed and foregoing Petition for Rehearing en banc on Louis J. Lefkowitz, 2 World Trade Center, New York, NY 10047, the New York Attorney General, at his last known address, with first-class postage pre-paid in the United States Post Office Box maintained by the United States Postal Service at 132 Nassau St., New York, NY


John G. O'Keefe

subscribed and sworn to before me
this 13th day of May, 1977.



Carl E. Person

Notary Public

State of New York

CARL E. PERSON
Notary Public, State of New York
No. 31-3008710
Qualified in New York County
Commission Expires March 30, 1979